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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5 0

BARBARA WATKINS, *et al.*,

Petitioners,

—v.—

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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BARBARA WATKINS, *et al.*,

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—v.—

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi, entered on April 25, 1972, affirming the petitioners' conviction of grand larceny in separate trials by the Circuit Court of the Second Judicial District of Jones County, Mississippi.

Opinions Below

The opinion of the Supreme Court of Mississippi affirming the judgments of the Circuit Court is reported at 262 So.2d 422 (Miss. 1972). It is set out in the Appendix, *infra*, pp. 1a-6a.

Jurisdiction

The judgment of the Supreme Court of Mississippi was entered on April 25, 1972, and a timely petition for rehearing was denied on June 5, 1972. By order dated August 21, 1972, Mr. Justice Powell extended the time to file this petition to and including October 3, 1972. This Court has jurisdiction under 28 U.S.C. section 1257(3).

Questions Presented

1. Whether there is any evidence in the record to support the conclusion by the court below that petitioners had failed to object to the racial composition of the grand and petit juries, or had waived the right to do so.

2. Whether petitioners had standing to assert that a search of their automobile was conducted in violation of the Fourth Amendment.

Statement of the Case

The petitioners, three black women, were convicted of grand larceny in separate jury trials by the Circuit Court of the Second Judicial District of Jones County, Mississippi.

Prior to their trials, each petitioner had challenged the jury venire, on the grounds of its systematic exclusion of Negroes, by filing a joint motion to quash the indictment, venire and petit venire (App., *infra,* p. 12a), and a joint motion for the issuance of a subpoena duces tecum for records showing the racial composition of the venire and the judi-

cial district from which it was drawn (App., *infra,* p. 10a). Both motions were filed with the court at 8:15 AM on April 9, 1971, the day of the trial of petitioner Barbara Watkins, three days before the trial of petitioner Mary Ruby Thomas, and five days before the trial of petitioner Maggie D. Thomas (Stip. 3).[1]

Petitioners' sworn motion to quash charged on the basis of published census figures that "Negroes have traditionally been, and are now being, in this district by elected officials systematically excluded from the venire from which grand and petit juries are chosen." (App., *infra,* p. 13a). The motion also charged that the exclusion of Negroes on all jury lists was the result of purposeful discrimination by state officials, and that if the indictment, venire and petit venire were not quashed, the petitioners would be denied their Sixth and Fourteenth Amendment rights to be tried by a fair and impartial jury. The sworn motion for a subpoena duces tecum stated that in order to prove petitioners' allegations in their motion to quash, it was necessary to summon certain elected public officials to testify and produce the voter registration and jury records for Jones County, Mississippi (App., *infra,* p. 11a). The motion to quash requested the trial court to set the matter down for a hearing following service of the subpoena duces tecum.

At the time of the trial of petitioner Barbara Watkins, the trial judge denied both motions as untimely, without a hearing. Counsel for petitioner Watkins requested the court to reconsider its ruling, stating that the defendant could not have known until the day before the trial when all the jurors were first presented in the jury box that there

[1] "Stip." refers to the Stipulation of Record filed with the Mississippi Supreme Court.

were grounds for making the motions (Stip. 4). The court denied the motion to reconsider its previous ruling (Stip. 5). Counsel renewed the motions at the conclusion of the State's case, and again they were denied (R. 75, 164, 246).

Subsequently, at the time of the trial of petitioner Mary Ruby Thomas on April 12, 1971, the court directed the clerk to enter the same orders denying the motions to quash and to issue a subpoena duces tecum as had been entered three days previously at the trial of petitioner Watkins (R. 163-64). Similar orders were entered on April 14, 1972 prior to the trial of petitioner Maggie D. Thomas (R. 192).

At each of the three trials the following testimony was heard by the jury:

On October 28, 1970 petitioners together entered the Famous Shop, a clothing store in Laurel, Mississippi, purchased two necklaces, and left the store (R. 9). Mrs. Donald Fisher, the daughter of the owner of the shop testified that she suspected petitioners of having stolen two garments (R. 8). After they had left the store petitioners were seen by Mrs. Fisher riding in a dark green Buick driven by petitioner Watkins (R. 35, 120, 208). The car stopped, was legally parked, and the three petitioners emerged and went into another store (R. 36).

Mrs. Fisher testified that when she saw petitioners go into the second store she reported the suspected larceny at the Famous Shop to a policewoman on the street (R. 13). Upon the arrival of the police at the second store, petitioners were arrested without a warrant and questioned with regard to the reported theft at the Famous Shop (R. 71-72). During their interrogation, another police officer, who had not participated in the arrest, searched the Buick in which

the petitioners had earlier been seen driving by Mrs. Fisher, and removed clothing from the car which Mrs. Fisher later identified as having been stolen from the Famous Shop. No warrant was obtained for the search, and the officer who conducted it did not testify at the trials of any of the petitioners. No attempt was made by the State to justify the search at a place distant from the arrest without impounding the car and obtaining a warrant.

Prior to the introduction of the evidence acquired through the warrantless search of the Buick, each of the petitioners in their separate trials moved to exclude the evidence as tainted on the basis of state and federal constitutional claims (R. 42, 131, 221). A hearing was conducted in the absence of the jury. Petitioner Watkins testified that she had been driving the Buick prior to the search; that it was registered in the name of Charles Jones, with whom she had lived for six years; and that she had his permission to drive it (R. 45). Petitioner Watkins further testified that she had told the arresting officer at the time of her arrest that she knew nothing about the car, because "I didn't think I had to give out any information at that time" (R. 48).[2] There was no testimony by the arresting officer that any of the petitioners had been advised of their rights prior to their interrogation about the car and the reported theft at the Famous Shop.

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[2] Petitioner Mary Ruby Thomas was not asked any question about the ownership of the Buick. She testified that she was a passenger in the car and that all three of the petitioners shared the cost of gas on their trip from Jackson to Laurel, Mississippi the day of their arrests (R. 132-39). Petitioner Maggie D. Thomas testified that the owner of the car, Charles Jones, had lent it to all three of the petitioners, and that they shared expenses (R. 216-22). The opinion below is in error, therefore, when it states that "[t]he record discloses that each of the appellants specifically denied any interest in the automobile" (App., *infra*, p. 5a).

The trial court in each case overruled the petitioners' timely objections to the admissibility of the clothing taken from the Buick, on the ground that they did not have standing to challenge the search, denied their request for a hearing on the constitutionality of the search, and permitted the jury to hear testimony that the clothing taken from the car had been stolen from the Famous Shop.[3] Each of the petitioners was thereafter found guilty of grand larceny. Without the admission of the tainted evidence there is a substantial likelihood that they all would have been acquitted.

Following their convictions each petitioner was sentenced to five years in the Mississippi State Penitentiary.

In a consolidated appeal to the Mississippi Supreme Court the convictions were affirmed. The heart of the Court's opinion is its holding that both of the substantial federal constitutional claims presented for review had been waived by petitioners at the time of their trials and therefore could not be considered on appeal. With regard to the racial composition of the jury, the Court held that, notwithstanding the motions made by petitioners before their trials, "[w]e are of the opinion that by accepting the jury the appellants Barbara Watkins and Mary Ruby Thomas waived its composition . . . [The appellant Maggie D. Thomas] made no effort by the introduction of witnesses or otherwise to indicate that the jurors were improperly drawn or selected, or to prove the systematic exclusion of jurors because of sex or race" (App., *infra*, p. 4a).

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[3] At the conclusion of the State's case in each trial, counsel for the petitioners renewed his motions to exclude the tainted evidence and moved to direct a verdict for each of the petitioners, in turn, on the ground that the search was in violation of the Fourth Amendment and the Mississippi State Constitution. Each of these motions was denied by the trial court.

With regard to the failure of the trial court to suppress the tainted evidence resulting from the illegal search of the Buick, the Court asserted that:

> "[t]he record discloses that each of the appellants specifically denied any interest in the automobile.[4] We therefore conclude that none of these appellants had standing to object to the search of the automobile since we stated in *Ball* v. *State*, 194 So.2d 502, 503 (Miss. 1967), the following: '. . . One testifying that property searched did not belong to him may not thereafter complain that the search was unlawful'" (App., *infra*, p. 5a).

REASONS FOR GRANTING THE WRIT

1. The holding of the court below denied petitioners their right to challenge the racial composition of the grand and petit juries.

The decision of the Mississippi Supreme Court is in conflict with decisions of this Court because it denied petitioners the right to show that Negroes were systematically excluded from the grand jury which indicted them and from the petit juries which convicted them. "This Court has repeatedly held that the Constitution prohibits such [exclusionary] selection practices, with respect to the grand jury, the petty jury, or both." *Peters* v. *Kiff*, 33 L.Ed. 2d 83, 90-91 (1972). To deny petitioners the procedural right to a hearing, necessarily deprived them of the right to show denial of the substantive right itself.

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[4] This is a misreading of the record. See n. 2, *supra*.

The petitioners repeatedly attempted to challenge the racial composition of the juries that indicted and convicted them, but they were never granted a hearing. Moreover, the court below held that, in the case of two of the petitioners, "by accepting the jury [they] waived its composition," and in the case of the third, "[t]he absence of any evidence of systematic exclusion of jurors on account of race or sex requires the conclusion on our part that any such objections were effectively waived . . ." [App., *infra*, p. 4a]. These conclusions are wholly unsupported by the record, a full review of which is necessary in this case. See *Ker* v. *California*, 374 U.S. 23, 24 (1963).

The court below found that the motion to quash, "though filed, was not directed to the attention of the Court nor a ruling thereon requested in the case of Barbara Watkins or Mary Ruby Thomas until the State had presented its evidence" (App., *infra*, p. 4a). The record, however, indicates that at the conclusion of the State's case in the trial of Barbara Watkins, the trial judge denied a motion to reconsider his prior ruling on the motion to quash (R. 75). The record also shows that at the time of the trial of Mary Ruby Thomas, the Court directed the clerk to enter the same rulings on the pending motion to quash as had been entered in the Watkins case (R. 163-64). The record and the opinion below cannot be reconciled on this point and to sustain the conclusions of the court below denies petitioner due process of law. *Thompson* v. *Louisville*, 362 U.S. 199 (1960). Even if the record and opinion were reconcilable, however, the Court has not indicated any adequate state ground for regarding the "procedural default" as an effective waiver of constitutional rights. *Henry* v. *Mississippi*, 379 U.S. 443,

447 (1965). Accordingly, the assertion below that the motion to quash was not timely made must be rejected.[5]

In the case of petitioner Maggie D. Thomas, who was tried five days after the motion to quash was filed, the Mississippi Supreme Court held that her challenge to the venire was properly denied on the merits. This conclusion overlooks the fact that the trial court afforded the petitioner no opportunity to present the merits of her claim. The court below apparently—though incorrectly—reasoned that since petitioner had "made no effort by the introduction of witnesses or otherwise" to prove systematic exclusion because of race (having been denied a hearing on the issue by the trial judge), "there was nothing before the trial judge to substantiate the motion," and thus "the absence of any evidence requires the conclusion" that petitioner had waived her constitutional right to a fair and impartial jury (App., *infra*, p. 4a).

This Court has long held that the denial of a request for a hearing to prove the allegations of a claim that Negroes have been systematically excluded from a jury list constitutes grounds for reversal. *Coleman* v. *Alabama*, 377 U.S. 129, 133 (1964); *Irvin* v. *Dowd*, 359 U.S. 394, 404 (1959). Cf. *Carter* v. *Texas*, 177 U.S. 442, 448-49 (1900). In *Coleman*, the issue of systematic exclusion was not even raised until

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[5] Nor does the filing of the motion to quash on the eve of trial in the case of petitioner Watkins run afoul of any state rules concerning timely filing of motions challenging the venire. The Mississippi Supreme Court itself has held that motions to quash filed at precisely the same point in trial proceedings must be entertained by the trial court. See *Caston* v. *State*, 240 So.2d 443 (Miss. 1970); *Spencer* v. *State*, 240 So.2d 260 (Miss. 1970); *Williams* v. *State*, 210 So.2d 780 (Miss. 1968); *Chinn* v. *State*, 210 So.2d 666 (Miss. 1968) (reversing the trial court's denial of a hearing); *Black* v. *State*, 187 So.2d 815 (Miss. 1966); *Bass* v. *State*, 182 So.2d 591 (Miss. 1966); *Hopkins* v. *State*, 182 So.2d 236 (Miss. 1966).

the filing of a motion for a new trial. While the precise requirements of the hearing prescribed by the Court have been left to the state courts, the Mississippi Supreme Court has specified a procedure which has not been made available to the petitioners in this case. In *Pollard* v. *State,* 205 So.2d 286, 288 (Miss. 1967), the trial court's denial of a hearing was reversed on the ground that:

> The lower court erred in not permitting appellants to obtain information by the issuance of a subpoena duces tecum to the circuit and chancery clerks relative to the issue of whether or not there had been habitual and systematic exclusion of Negroes from the grand and petit juries of Clay County.

Similarly, the Mississippi Court in *Chinn* v. *State,* 210 So.2d 666 (Miss. 1968), held that the denial of a hearing on a motion challenging the racial composition of a jury venire was reversible error. "Whether or not a defendant can establish an alleged racial discrimination, due process of law demands he have his day in court on this issue, and this, of course, includes a reasonable opportunity to produce evidence concerning it." 210 So.2d at 668.

The misreading of the record by the court below concerning the timeliness of petitioners' constitutional challenge to the jury venire, coupled with its failure to apply state and federal requirements that a hearing be conducted on the issue, vitiate the court's conclusion that petitioners waived their constitutional right to a fair and impartial jury.

The denial of petitioners' right to a hearing is so clear in this case, the petition for certiorari should be granted and the convictions reversed summarily.

2. The petitioners had standing to raise constitutional objections to the search of their car and should have been granted a hearing to determine whether the search was conducted in violation of the Fourth Amendment.

The Mississippi Supreme Court disregarded petitioners' claims that the search of their automobile was conducted in violation of their state and federal constitutional rights, on the ground that "'(o)ne *testifying* that property searched did not belong to him may not thereafter complain that the search was unlawful.' *Ross* v. *State*, 140 Miss. 367, 105 So. 846 (1925)" (App., *infra*, p. 5a) (emphasis supplied). To the extent that this holding is based on the Court's conclusion that petitioners "specifically denied any interest in the searched automobile" (App., *infra*, p. 5a), it is completely unsupported by the record in this case. To the contrary, the record indicates that each of the petitioners testified at trial that she had a possessory interest in the car and made no attempt to deny having had such an interest at the time it was searched (R. 45, 137, 220).[6]

The only possible support in the record for the Court's conclusion is a statement by petitioner Watkins at the time of her arrest, in response to a question by the arresting officer, that she knew nothing about the car "because I didn't think I had to give out any information at that time" (R. 48). Nothing in the record indicates that the petitioners were warned of their rights at the time of their arrest, and there is no basis for regarding petitioner Watkins' statement as testimonial.

This Court has repeatedly held that anyone with a possessory interest in searched property, *United States* v. *Jef-*

[6] See n. 2, *supra*.

fers, 342 U.S. 48 (1951), or even anyone legitimately on premises where a search occurs," *Jones* v. *United States,* 362 U.S. 257, 267 (1960), may challenge its legality when the fruits of the search are proposed to be used against him. *Mancusi* v. *DeForte,* 392 U.S. 364, 368 (1968), *Katz* v. *United States,* 389 U.S. 347 (1967).[7] Moreover, petitioners were "the persons against whom the search was directed," *Robinson* v. *State,* 219 So.2d 916 (Miss. 1969), and therefore had standing under Mississippi law to make state constitutional as well as Fourth Amendment objections.

The Mississippi Supreme Court, however, apparently concluded that petitioners had waived their constitutional objections when Barbara Watkins told the arresting officer that she knew nothing about the car. This conclusion could have been reached only by equating a statement made by one of the petitioners under the pressure of interrogation at the time of her arrest, without being informed of her constitutional right not to make any statement, with a full testimonial waiver, intelligently and freely given under oath. Such an equation does violence to the fundamental principle that "waivers of constitutional rights not only

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[7] Even if the record were unclear, which it is not, about petitioners' asserted interest in the searched Buick, this Court could treat the case as it did *Combs* v. *United States,* 33 L.Ed. 2d 308, 311 (1972), decided last term. There the Court, *per curiam,* pointed out that:

> the record now before us is virtually barren of the facts necessary to determine whether petitioner had an interest in connection with the searched premises that gave rise to 'a reasonable expectation (on his part) of freedom from governmental intrusion' upon those premises. *Mancusi* v. *DeForte,* 392 U.S. 364, 368 (1968). If petitioner can establish facts showing such an interest, he will have demonstrated a basis for standing to attack the search.

The case was remanded for an evidentiary hearing.

must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). See also *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) ("courts must indulge every reasonable presumption against loss of constitutional rights").

The cases cited by the Mississippi Supreme Court in support of its conclusion that petitioners waived their Fourth Amendment objections to the search of the Buick each hold that where a defendant takes the witness stand and testifies in his defense that he had no interest in the premises searched nor the fruits of the search, he may not subsequently claim the personal protection of the Fourth Amendment. In *Ross* v. *State, supra,* for example, the Court held that a defendant could not object to an unlawful search, while simultaneously testifying that the property searched was neither his own nor in his possession at the time of the search. "Certainly the appellant waived his right to claim the search was unlawful when he *solemnly and deliberately testified, on oath,* that the property was not his property." 105 So. at 848 (emphasis supplied). A similar testimonial waiver was made at trial by the appellants in *Ball* v. *State*, 194 So.2d 502 (Miss. 1967); *Canning* v. *State*, 226 So.2d 747 (Miss. 1969); and *Baldwin* v. *State*, 213 So.2d 819 (Ala. 1968), also relied upon by the Mississippi Supreme Court to bolster its holding.

By ignoring the waiver standard enunciated in *Brady, supra,* and by misapplying its own prior decisions, therefore, the Mississippi Supreme Court has enunciated a novel, unsound and patently unconstitutional standard for determining the waiver of constitutional rights. The only reasonable conclusion to be drawn from the record is that peti-

tioners had standing to object to the illegality of the search, and that they did not waive their objections in a constitutionally acceptable manner.[8]

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[8] While the merits of their Fourth Amendment objections are not properly before this Court, petitioners suggest that the Court would be justified in vitiating the search entirely because on this record there are no constitutional grounds upon which the state could justify it. The petitioners were arrested on the second floor of a department store (R. 71), and their car was searched while it was parked and unoccupied at a point distant from the place of the arrest (R. 15). The state offered no justification for proceeding with the search without first impounding the car and obtaining a search warrant.

This Court has recently reiterated that "searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specially established and well-delineated exceptions." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454 (1971). Moreover, "there must be a showing by those who seek the exemption . . . that the exigencies of the situation made that course imperative. The burden is on those seeking the exemption to show the need for it." 403 U.S. at 455.

The search of the Buick cannot be justified as within the scope of a lawful arrest, since it occurred at a point distant from the arrest. See *Chimel* v. *California*, 395 U.S. 752 (1968). Nor can it be justified on the ground of "exigent circumstances" such as the mobility of the car, because none of the petitioners had access to the car when they were in the store or after their arrest. *Coolidge*, 403 U.S. at 459 and cases cited therein. Since the warrantless search cannot be justified on any constitutionally permissible ground, therefore, it can properly be found unreasonable per se.

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CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

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SUPREME COURT OF MISSISSIPPI

BARBARA WATKINS *et al.*

v.

STATE OF MISSISSIPPI.

April 25, 1972.

Rehearing Denied June 5, 1972.

Defendants were convicted in the Circuit Court, Jones County, James D. Hester, J., of shoplifting, and they appealed. The Supreme Court, Patterson, J., held that defendants who specifically denied any interest in automobile allegedly used by them on date of alleged shoplifting lacked standing to object to search of automobile.

Affirmed.

1. Jury—33(5)

Defendants, whose motion to quash indictment, venire and petit venire without prejudice and order the county board of supervisors to prepare a venire selected by random samples from all of the alive persons on the voter registration books of the district was not directed to attention of court nor a ruling thereon requested until State had presented its evidence, and who accepted jury, waived its composition.

2. Jury—120

Mere reference to a census report and thereafter numerically depicting the white-black ratio of county, without more, is insufficient to shift burden of proof upon a discrimination issue from movant who has the affirmative of the issue to the State.

3. Jury—33(5)

Where defendant's motion to quash indictment, venire and petit venire without prejudice and order county board of supervisors to prepare a venire selected by random samples from all of the alive persons of the voter registration books of the district, as well as a motion for subpoena duces tecum for the voter registration books, was called to attention of court prior to State's presentation of evidence but defendant made no effort by the introduction of witnesses or otherwise to indicate that the jurors were improperly drawn or selected or to prove systematic exclusion of jurors because of sex or race, defendant's objections were effectively waived.

4. Searches and Seizures—7(26)

Defendants who specifically denied any interest in automobile allegedly used by them on date of alleged shoplifting lacked standing to object to search of automobile. U.S.C.A. Const. Amend 4; Const. 1890, § 23.

W. S. Moore, Jackson, for appellants.

A. F. Summer, Atty. Gen. by James W. Haddock, Sp. Asst. Atty. Gen., Jackson, for appellee.

WATKINS v. STATE

Cite a, Miss., 262 So.2d 422

PATTERSON, Justice:

The appellants, Barbara Watkins, Mary Ruby Thomas and Maggie D. Thomas, were convicted of "shoplifting" in separate trials by the Circuit Court of the Second Judicial District of Jones County and each was sentenced to serve five years in the state penitentiary. The evidence being almost identical, the cases were consolidated for appeal to this Court.

Two points are argued for reversal. These are (1) that the burden of going forward with the evidence is upon the State to explain the disparity between the percentage of Negroes in the Second Judicial District of Jones County and those on the venire for the year 1970-71 and (2) that the trial court erred in refusing to suppress evidence resulting from an illegal search of an automobile.

Each of the defendants was represented by the same attorneys. On April 9, 1971, the date of the trial of Barbara Watkins, there was filed a motion common to all of the appellants to "quash the indictment, venire and petit venire without prejudice and order the Board of Supervisors of Jones County to prepare a venire selected by random samples from all of the alive persons on the voter registration books of this district." Incorporated within this motion is a statement that the 1970 census of population, of which courts take judicial notice, indicates that Jones County has 56,357 inhabitants of whom 42,403 are white, 13,810 are Negro, and 144 are other nonwhite persons, a ratio of 75.24% white to 24.76% nonwhite.

[1] This motion, though filed, was not directed to the attention of the court nor a ruling requested thereon in the case of Barbara Watkins or Mary Ruby Thomas until the State had presented its evidence and was then included in each of the defendants' motions to exclude the State's evidence and to direct a verdict for the defendants. We are of the opinion that by accepting the jury the appellants Barbara Watkins and Mary Ruby Thomas waived its composition. Holloway v. State, 242 So.2d 454 (Miss. 1970).

[2, 3] The motion to quash, as well as a motion for a subpoena duces tecum for the voter registration books, etc., in the trial of Maggie D. Thomas was called to the attention of the court prior to the State's presenting its evidence and was overruled by the court as not being timely filed. The appellant, however, made no effort by the introduction of witnesses or otherwise to indicate that the jurors were improperly drawn or selected, or to prove the systematic exclusion of jurors because of sex or race. There was thus nothing before the trial judge to substantiate the motion to quash other than the statement contained in the motion relating to the census report. The motion was renewed at the conclusion of the State's evidence. It reflects there was one black male who served on the petit jury. The absence of any evidence indicative of systematic exclusion of jurors on account of race or sex requires the conclusion on our part that any such objections were effectively waived by the applicant. Gordon v. State, 160 So.2d 73 (Miss. 1964), and Holloway, supra. The mere reference to a census report and thereafter numerically depicting the white-black ratio of a county, without more, is insufficient in our opinion to shift the burden of proof upon a discrimination issue from the movant who has the affirmative of the issue

to the State. We conclude this assignment of error to be without merit.

[4] The next contention of the appellants is that an automobile used by them on the date of the alleged crime was searched without probable cause or warrant and hence the articles removed therefrom, later identified as having been stolen, were erroneously admitted into evidence as they were the result of an illegal search in violation of the Fourth Amendment to the Federal Constitution and Section 23, Mississippi Constitution (1890). The record discloses that each of the appellants specifically denied any interest in the automobile. We therefore conclude that none of these appellants had standing to object to the search of the automobile since we stated in Ball v. State, 194 So.2d 502, 503 (Miss. 1967), the following:

> . . . One testifying that property searched did not belong to him may not thereafter complain that the search was unlawful. Ross v. State, 140 Miss. 367, 105 So. 846 (1925).

See also Canning v. State, 226 So.2d 747 (Miss. 1969), as well as Baldwin v. State, 282 Ala. 653, 213 So.2d 819 (1968), where the Supreme Court of Alabama stated:

> The right to protection against an unlawful search is personal, and a defendant in a criminal case who denies any proprietary or possessory interest in seized property has no standing to object to the method of seizure. . . .

Of interest, Fisher, Search and Seizure, section 57, page 106 (1970).

We determine the contentions of the appellants relating to the search of the automobile to be without merit.

We have reviewed the rocords in their entirety and find there was sufficient evidence in each to uphold the jury verdict. There being no merit in the assignments of error, we conclude that the verdicts and sentences of the trial court should be affirmed.

Affirmed.

GILLESPIE, C. J., and SMITH, ROBERTSON and SUGG, JJ., concur.

Commitment of BARBARA WATKINS, No. 4242

STATE OF MISSISSIPPI, COUNTY OF JONES

CIRCUIT COURT—SECOND DISTRICT

To the Secretary of the Board of Trustees of Mississippi State Penitentiary:

You are hereby notified that at the March Term 1971 of the Circuit Court Judge James D. Hester presiding the following named person was tried, convicted and sentenced to a term in the State Penitentiary as follows:

Name Barbara Watkins	Alias None
Date of Sentence April 9, 1971	Crime Shoplifting
Term of Sentence Five (5) years	Sex Female
Color Colored	Appealed Yes

REMARKS:

Give brief summary of crime committed:
did wilfully, unlawfully and feloniously take possession of and take, steal and carry away: 1 brown ladies Paula Brooks ensemble; 1 green ladies Paula Brooks ensemble; 1 red-white Paula Brooks ensemble; 1 black-white Paula Brooks ensemble of the total value of $296.00

Date April 12, 1971

Donice V. Knight, Clerk
Marguerite Mullican, D. C.

Commitment of MARY RUBY THOMAS No. 242

STATE OF MISSISSIPPI, COUNTY OF JONES

CIRCUIT COURT—SECOND DISTRICT

To the Secretary of the Board of Trustees of Mississippi State Penitentiary:

You are hereby notified that at the March Term 1971 of the Circuit Court Judge James D. Hester presiding the following named person was tried, convicted and sentenced to a term in the State Penitentiary as follows:

Name Mary Ruby Thomas	Alias None
Date of Sentence April 12, 1971	Crime Shoplifting
Term of Sentence Five (5) years	Sex Female
Color Colored	Appealed Yes

REMARKS:

Give brief summary of crime committed:
did wilfully, unlawfully, and feloniously take possession of and take, steal and carry away: 1 Brown ladies Paula Brooks ensemble; 1 green ladies Paula Brooks ensemble; 1 red-white ladies Paula Brooks ensemble; 1 black-white ladies Paula Brooks ensemble being of the total value of $296.00

Date April 12, 1971.

Donice V. Knight, Clerk
Marguerite Mullican, D. C.

Commitment of MAGGIE D. THOMAS, Cause No. 4242

STATE OF MISSISSIPPI, COUNTY OF JONES

CIRCUIT COURT—SECOND DISTRICT

To the Secretary of the Board of Trustees of Mississippi State Penitentiary:

You are hereby notified that at the March Term 1971 of the Circuit Court Judge James D. Hester presiding the following named person was tried, convicted and sentenced to a term in the State Penitentiary as follows:

Name Maggie D. Thomas	Alias None
Date of Sentence April 15, 1971	Crime Shoplifting
Term of Sentence Five (5) years	Sex Female
Color Colored	Appealed yes

REMARKS:

Give brief summary of crime committed:
did wilfully, unlawfully, and feloniously take possession of and take, steal and carry away: 1 brown ladies Paula Brooks ensemble; 1 green ladies Paula Brooks ensemble; 1 red-white ladies Paula Brooks ensemble; one black-white ladies Paula Brooks ensemble being of the value of $296.00

Date: April 16, 1971

Donice V. Knight, Clerk
Marguerite Mullican, D. C.

IN THE

CIRCUIT COURT

OF THE SECOND JUDICIAL DISTRICT
OF JONES COUNTY, MISSISSIPPI

No. 4242

STATE OF MISSISSIPPI

vs.

BARBARA WATKINS, MARY THOMAS
and MAGGIE D. THOMAS

SWORN MOTION FOR SUBPOENA DUCES TECUM

STATE OF MISSISSIPPI

COUNTY OF HINDS

This day personally appeared before me, the undersigned notary public in and for said county and state, W. S. Moore, known to me, who, after having been by me first duly sworn, on his oath states as follows:

1. W. S. Moore is the attorney of record for the defendants, and in support of motions heretofore filed in this cause, needs, in order to prove properly the allegations of the motions, to have summoned Leonard B. Caves, Chancery Clerk, Donice Knight, Circuit Clerk, and Supervisors Hubert Hosey, J. P. Parker, James Rasberry, George Harrison and H. H. Bryant, to be and appear before this court at such time and place directed by Your Honor to bring with them the following, if they have the same in their possession:

(a) All records showing registered voters for the period 1967-1971, including the registration books for all precincts (showing chronological lists of registrants) and the poll book for all precincts (showing alphabetical lists of registered voters);

(b) List of all persons called for jury duty, and all those who actually served on grand or petit juries, in each term of the Circuit Court of the Second Judicial District of Jones County, Mississippi, from 1967 through 1971, inclusive;

(c) All lists of voters registered by the Federal Examiners;

(d) All lists of persons eligible to be jurors transmitted to the Board of Supervisors of Jones County, Mississippi, from 1967 through 1971, from which the Board of Supervisors compiled its juror lists; and

(e) All records showing racial identification of any persons listed in the records requested.

s/ W. S. MOORE
W. S. Moore

SWORN TO AND SUBSCRIBED before me, on this the 8th day of April, 1971.

s/ FANNIE P. BRUMMETT

My commission expires March 2, 1974.

(SEAL)

FILED: Apr 9, 1971

Donice V. Knight, Circuit Clerk

Jones County, Mississippi by: M. M.

IN THE

CIRCUIT COURT

OF THE SECOND JUDICIAL DISTRICT
OF JONES COUNTY, MISSISSIPPI

No. 4242

STATE OF MISSISSIPPI

VS.

BARBARA WATKINS, MARY THOMAS
and MAGGIE D. THOMAS

SWORN MOTION TO QUASH THE VENIRE,
INDICTMENT, AND PETIT VENIRE

STATE OF MISSISSIPPI

COUNTY OF HINDS

This day personally appeared before me, the undersigned notary public in and for said county and state, Barbara Watkins, Mary Ruby Thomas and Maggie D. Thomas, who, after having been by me first duly sworn, each for herself on their oath depose and say as follows:

1. All of the matters and things stated in this motion are true and correct as therein stated, and as to those matters stated on information and belief, the affiants believe them to be true.

2. The defendants are Negro female citizens of the State of Mississippi and the United States.

3. The defendants were indicted during the March, 1971 term of this court, on an indictment charging grand larceny.

4. The 1970 Census of Population PC (V2)-26 dated January 1971, being the latest census figures, of which this Court does take judicial notice, show that Jones County, Mississippi, has 56,357 inhabitants of whom 42,403 are white, 13,810 are Negro and 144 are other non-white persons. 75.24% of the inhabitants of Jones County are white and 24.76% are non-white.

5. The venire for this district for the year 1970-1971, compiled by the Board of Supervisors at its April, 1970, meeting, is the venire from which the grand jury which indicted the defendants was chosen, and is the jury list from which the petit jury which will try the defendants will be chosen.

6. Negroes have traditionally been, and are now being, in this district, by elected officials and their deputies and agents systematically excluded from the venire, from which grand and petit juries are chosen. The under-representation of Negroes on all the jury lists is the result of purposeful discrimination on the part of the persons choosing the juries, acting under color of law and in their official capacities.

7. If the venire, indictment and petit jury venire are not quashed by this Court, the defendants will be denied the rights guaranteed to them to be tried by a fair and impartial jury which is a cross section of this district, in violation of the Sixth and Fourteenth Amendments of the Constitution of the United States and of Article III, Sections 14 and 26 of the Constitution of Mississippi.

WHEREFORE, the defendants respectfully request that this Court set this matter down for hearing on a day certain, allowing sufficient time for the parties to have their sub-

poenas issued and served, and upon a full hearing on this motion, that this Court quash the indictment, venire and petit venire, without prejudice, and order the Board of Supervisors of Jones County, Mississippi, to prepare a venire selected by random sample from all of the alive persons on the Voter Registration Books of this district.

Respectfully submitted,

s/ BARBARA WATKINS
Barbara Watkins

s/ MARY RUBY THOMAS
Mary Ruby Thomas

s/ MAGGIE D. THOMAS
Maggie D. Thomas

FILED: Apr 9, 1971

Donice V. Knight, Circuit Clerk

Jones County, Mississippi by: M. M.

SWORN TO AND SUBSCRIBED before me this the 8th day of April, 1971.

s/ FANNIE P. BRUMMETT
Fannie P. Brummett

My commission expires March 2, 1974.

FILED: Apr 9, 1971

Donice V. Knight, Circuit Clerk

Jones County, Miss. by: M. M.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-540

WATKINS, ET AL.,
Petitioners,

VS.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Supreme Court of Mississippi (Respondent's Appendix A) is reported as *Watkins, et al.* v. *State,* 262 So.2d 422 (Miss. 1972).

JURISDICTION

Petitioners seek to have this Court grant certiorari to review the decision of the Supreme Court of Mississippi through the authority of Title 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the petitioners waive any objections to the composition of the grand and petit juries?

2. Was the search of the automobile in which petitioners were riding a violation of the Fourth Amendment?

STATEMENT OF FACTS

On or about the 28th day of October, 1970, the petitioners, Barbara Watkins, Mary Ruby Thomas and Maggie D. Thomas, entered the Famous Shop in Laurel, Mississippi. They looked through various articles of women's clothing, made some small purchases, and then left the store. Mrs. Fisher, who worked in the Famous Shop, observed that the three women had been acting suspiciously. Immediately after the petitioners left the store, Mrs. Fisher observed empty hangers on the clothes rack where petitioners had been inspecting various articles of women's clothing. No other individuals had been in the store and the store policy was that empty hangers would not be allowed on the rack. Mrs. Fisher went outside the store and she observed the three petitioners riding alone in a dark green Buick automobile. Mrs. Fisher also observed the automobile park and she observed the three petitioners enter another store. Mrs. Fisher pointed out the petitioner's automobile to a police woman who was standing nearby. (The police had previously been called.) Petitioners were then arrested in the second store and they were carried to the automobile which they had been driving. The automobile was searched and various articles of clothing identified as clothing which was removed from the Famous Shop was found under the front seat of the automobile.

ARGUMENT

POINT I

The Petitioners Failed to Show Systematic Exclusion of Individuals from the Grand and Petit Juries on the Basis of Race.

The Supreme Court of Mississippi has stated that "the mere allegation of discrimination against an eligible class or race as regards selection for jury service is not proof in itself of the presence of such discrimination. And, the burden of proof to sustain the contention is upon the one making the allegation—usually the defendant." *Goldsby* v. *State*, 226 Miss. 1, 86 So.2d 27 at 32 (1956), cert. den. 77 S.Ct. 266, 352 U.S. 944, 1 L.Ed.2d 239. As shown by the trial record and as found by the Supreme Court of Mississippi, the petitioners in the case at bar made no attempt to introduce any evidence to show there had been any systematic exclusion of individuals because of race from the grand jury, petit jury and venire.

If there was any evidence of systematic exclusion the Supreme Court of Mississippi would have reversed petitioners' convictions as it has done in other cases. *Chinn* v. *State*, 248 So.2d 801 (Miss. 1971); *Caston* v. *State*, 240 So.2d 443 (Miss. 1970); *Spencer* v. *State*, 240 So.2d 260 (Miss. 1970); *Williams* v. *State*, 210 So.2d 780 (Miss. 1968); *Harris* v. *State*, 206 So.2d 829 (Miss. 1968); *Watts* v. *State*, 196 So.2d 79 (Miss. 1966); *Harper* v. *State*, 171 So.2d 129, 251 Miss. 699 (1965).

POINT II

The Search of the Automobile Was Not Unreasonable and in Violation of the Fourth Amendment.

Mrs. Fisher, an employee of the Famous Shop, observed that the petitioners were the only customers in the shop. She also observed that when the petitioners left certain dresses were missing from hangers on which dresses were always kept. If a dress was removed from any one of the hangers for any reason, the hanger would also be removed. Mrs. Fisher went outside the Famous Shop and observed the petitioners who were acting suspiciously. Mrs. Fisher continued to observe the petitioners as they drove an automobile a short distance where they parked it and went into another store. Mrs. Fisher pointed out the automobile to the law enforcement authorities. The petitioners were arrested in the store which they had just entered and they were brought to the automobile which they had been driving and which they had parked on a city street. A search of the automobile revealed the clothing which was taken from the Famous Shop.

Petitioners contend the search was unlawful. However, the petitioners denied any possessory interest in the automobile.[1]

---

1. Petitioner Barbara Watkins testified as follows:

Q. But you didn't claim the car then, did you?

A. No, Sir, I didn't.

Q. You told the officers you didn't know nothing about the car, didn't you?

A. I sure did, Mr. Odom. (R. 48)

Petitioner Mary Ruby Thomas also testified that she heard petitioner Barbara Watkins tell the policeman that she (Barbara Watkins) did not drive the automobile. (R. 138)

In regard to petitioner Ruby Thomas, the law enforcement officer testified:

(Continued on following page)

Petitioners admitted to the officers that they did not own and had not driven the automobile in question; however, the officers also knew that the petitioners had in fact driven the automobile to the location where it was parked. On the basis of this knowledge, it would be reasonable for the officers to search the automobile in an effort to determine its owner.

The officers had a legitimate reason for checking the automobile in order to determine the identity of the driver and passengers (petitioners).

As the petitioners denied any ownership, possessory interest and the fact that they had been in the vehicle, the logical conclusion was that the petitioners had stolen the vehicle. That alone would justify the officers in searching the automobile for evidence as to the identity of the thieves and evidence of the crime.

The only alternative would be that the petitioners had abandoned the vehicle in that they denied any knowledge concerning it or any interest in it. The abandonment would likewise justify the search. *United States* v. *Gibson,* 421 F.2d 662 (Fifth Circuit 1970).

In any event upon the arrest of the petitioners, and it must be noted that the validity of the arrest is not questioned, the petitioners would be carried to police headquarters. And, to protect the automobile and its contents

---

Footnote continued—

A. She did not say anything other than, "This is not my car; I do not have a car. I walked down here. I do not have a car and this is not my car." (R. 162)

As to petitioner Maggie Thomas, her own testimony was that she did not drive the automobile. (R. 220)

The police officer in testimony referring to the three petitioners stated: "The three of them said, including the defendant, that that was not their car and they did not have a car and that they walked down here." (R. 239)

it was necessary that the officers remove the automobile and its contents from the city streets and take it into their custody. *Hogan* v. *State*, 235 So.2d 704 (Miss. 1970). Since it was the duty of the officers to hold the automobile it would be unreasonable to find that for their protection the officers did not have the duty to search the automobile as they were responsible for its contents and in order to properly account for such contents the officers had to inventory and observe them. *Jackson* v. *State*, 243 So.2d 396 (Miss. 1971).

Further, the petitioners were identified while in the vehicle thereby justifying its seizure and search. *Dorsey* v. *State*, 243 So.2d 550 (Miss. 1971); *Cooper* v. *California*, 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788.

As the validity of the arrest is not in question the officers had the duty under any of these circumstances to seize the automobile. The seizure being unquestionably legal the officers could search the vehicle at the scene or at the police station as there is no contention that probable cause was lacking, and as probable cause existed for the search at that instant there was no necessity of obtaining a search warrant based upon the same probable cause. *Chambers* v. *Maroney*, 399 U.S. 42, 26 L.Ed.2d 419, 90 S.Ct. 1975 (1970).

In any event, *Jones* v. *United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725 (1960), states:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

CONCLUSION

Petitioners failed to show any systematic exclusion in the selection of the grand and petit juries on the basis of race. The search of the automobile was not unreasonable in view of the circumstances and was not a violation of petitioners' Fourth Amendment rights. Therefore the petition for writ of certiorari should be denied.

Respectfully submitted,

A. F. SUMMER
Attorney General

By: .....
TIMMIE HANCOCK
Special Assistant Attorney General

CERTIFICATE

I, Timmie Hancock, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, three copies of the foregoing Brief in Opposition to the Honorable William Sebastian Moore, 514 Barnett Building, Jackson, Mississippi 39201.

This the 30th day of January, 1973.

.....
Special Assistant Attorney General

APPENDIX "A"

IN THE SUPREME COURT OF MISSISSIPPI

NO. 46,709

BARBARA WATKINS, MARY RUBY THOMAS AND MAGGIE D. THOMAS

v.

STATE OF MISSISSIPPI

PATTERSON, JUSTICE:

The appellants, Barbara Watkins, Mary Ruby Thomas and Maggie D. Thomas, were convicted of "shoplifting" in separate trials by the Circuit Court of the Second Judicial District of Jones County and each was sentenced to serve five years in the state penitentiary. The evidence being almost identical, the cases were consolidated for appeal to this Court.

Two points are argued for reversal. These are (1) that the burden of going forward with the evidence is upon the State to explain the disparity between the percentage of Negroes in the Second Judicial District of Jones County and those on the venire for the year 1970-71 and (2) that the trial court erred in refusing to suppress evidence resulting from an illegal search of an automobile.

Each of the defendants was represented by the same attorneys. On April 9, 1971, the date of the trial of Barbara Watkins, there was filed a motion common to all of the appellants to "quash the indictment, venire and petit venire without prejudice and order the Board of Supervisors of Jones County to prepare a venire selected by random samples from all of the alive persons on the

voter registration books of this district." Incorporated within this motion is a statement that the 1970 census of population, of which courts take judicial notice, indicates that Jones County has 56,357 inhabitants of whom 42,403 are white, 13,810 are Negro, and 144 are other nonwhite persons, a ratio of 75.24% white to 24.76% nonwhite.

This motion, though filed, was not directed to the attention of the court nor a ruling requested thereon in the case of Barbara Watkins or Mary Ruby Thomas until the State had presented its evidence and was then included in each of the defendants' motions to exclude the State's evidence and to direct a verdict for the defendants. We are of the opinion that by accepting the jury the appellants Barbara Watkins and Mary Ruby Thomas waived its composition. Holloway v. State, 242 So.2d 454 (Miss. 1970).

The motion to quash, as well as a motion for a subpoena duces tecum for the voter registration books, etc., in the trial of Maggie D. Thomas was called to the attention of the court prior to the State's presenting its evidence and was overruled by the court as not being timely filed. The appellant, however, made no effort by the introduction of witnesses or otherwise to indicate that the jurors were improperly drawn or selected, or to prove the systematic exclusion of jurors because of sex or race. There was thus nothing before the trial judge to substantiate the motion to quash other than the statement contained in the motion relating to the census report. The motion was renewed at the conclusion of the State's evidence. It reflects there was one black male who served on the petit jury. The absence of any evidence indicative of systematic exclusion of jurors on account of race or sex requires the conclusion on our part that any such objections were effectively waived by the applicant. Gordon v. State, 160

So.2d 73 (Miss. 1964), and Holloway, supra. The mere reference to a census report and thereafter numerically depicting the white-black ratio of a county, without more, is insufficient in our opinion to shift the burden of proof upon a discrimination issue from the movant who has the affirmative of the issue to the State. We conclude this assignment of error to be without merit.

The next contention of the appellants is that an automobile used by them on the date of the alleged crime was searched without probable cause or warrant and hence the articles removed therefrom, later identified as having been stolen, were erroneously admitted into evidence as they were the result of an illegal search in violation of the Fourth Amendment to the Federal Constitution and Section 23, Mississippi Constitution (1890). The record discloses that each of the appellants specifically denied any interest in the automobile. We therefore conclude that none of these appellants had standing to object to the search of the automobile since we stated in *Ball* v. *State*, 194 So.2d 502, 503 (Miss. 1967), the following:

> . . . One testifying that property searched did not belong to him may not thereafter complain that the search was unlawful. Ross v. State, 140 Miss. 367, 105 So. 846 (1925).

See also Canning v. State, 226 So.2d 747 (Miss. 1969), as well as *Baldwin* v. *State*, 213 So.2d 819 (Ala. 1968), where the Supreme Court of Alabama stated:

> The right to protection against an unlawful search is personal, and a defendant in a criminal case who denies any proprietary or possessory interest in seized property has no standing to object to the method of seizure. . . .

Of interest, Fisher, *Search and Seizure*, section 57, page 106 (1970).

We determine the contentions of the appellants relating to the search of the automobile to be without merit.

We have reviewed the records in their entirety and find there was sufficient evidence in each to uphold the jury verdict. There being no merit in the assignments of error, we conclude that the verdicts and sentences of the trial court should be affirmed.

AFFIRMED.

GILLESPIE, C.J., AND SMITH, ROBERTSON AND SUGG, JJ., CONCUR.